DEFECTIVE ALIMONY DECREES IN MASSACHUSETTS.

IT not infrequently happens that alimony is granted upon a petition for divorce and alimony, in which there are allegations of cause for divorce only. The pleader inadvertently supposes that a petition so drawn is sufficient, the loose expression, "alimony is an incident to divorce," being led to an illogical conclusion. But certain cases have very recently come into being which, together, decide thus: —

1. A decree for alimony rendered at the termination of a suit for a divorce, in which there are allegations of cause for divorce, but no additional allegations of a cause for that alimony, in which there is only a prayer for alimony without corresponding allegations of the facts which, if proved, entitle the woman to the specific decree for alimony rendered, is void.

2. Such a decree for alimony is void, because it deprives the defendant of his property without a statute, which is unconstitutional, as divesting him of his property without "due process of law."

3. In a suit to determine the status of two persons (divorce), a court has no jurisdiction to decree property from one individual to another (alimony), without some allegations bringing that property into litigation. A decree (for alimony), under such circumstances, with such antecedents, is void, and may be impeached collaterally as having no legal foundations.

I.

Many an attorney in Massachusetts perhaps does not realize the collective result of the Massachusetts decisions on the subject of alimony and its proper allegations.

If the Massachusetts statutes, when taken together, authorized alimony to be decreed as a mere incident to divorce, and if alimony was the result of nothing else than a cause for divorce, then indeed only some statutory cause for divorce need be pleaded, and alimony prayed for on that.

But in Graves *v.* Graves,[1] the court said: "In making any order

[1] 108 Mass. 321.

respecting alimony, the court takes into consideration the property and capacity, or, in the phrase of the English ecclesiastical courts, the 'faculties' of the husband at the time." [1]

This "property" or "capacity" to earn are then material facts. Must they be alleged?

In Sparhawk *v.* Sparhawk,[2] the court held that an alimony decree must be "warranted by the allegations of the bill or petition," and cited Mason *v.* Daly [3] as the controlling authority. But this is an equity case. It cites Stanley *v.* Stark,[4] also an equity case, which cites in turn Smith *v.* Townsend,[5] still another case in equity. The principle as to pleading material facts which is enounced in this last case, and which thus runs by successive citations into the alimony case of Sparhawk *v.* Sparhawk, is as follows: "Upon this appeal there is nothing before the full court except the question whether the final decree is supported by the pleadings in the case. It may be true that the evidence produced at the hearing fully sustained the decree, and yet it is open to the defendant to claim that upon the allegations in the bill the plaintiffs, as matter of law, are not entitled to the relief awarded." [6]

This chain of citations abundantly demonstrates that equity law applies to a bill that asks alimony, and to the decree that is founded upon its allegations.[7]

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[1] "The defendant husband being left entirely without property, no decree for alimony can be rendered against him, alimony being an allowance out of the *husband's estate* for the support of the wife. Where there is no estate, there can be no alimony." Feigley *v.* Feigley, 7 Md. 563.

[2] 120 Mass. 390.

[3] 117 Mass. 403.

[4] 115 Mass. 259.

[5] 109 Mass. 500.

[6] Slack *v.* Black, 109 Mass. 499. "Except in cases where express exceptions have been made, the laws regulating the practice in the court of chancery apply in cases of divorce." Fulton *v.* Fulton, 36 Miss. 517, 520.

[7] See also Crockett *v.* Lee, 7 Wheat. 522, p. 525: "No rule is better settled than that the decree must conform to the allegations as well as to the proofs of the cause. If it be void in itself, no testimony can sustain it. The counsel say, it would be monstrous, if, after the parties have gone to trial and directed all their testimony to a certain point, their rights should be made to depend, in the appellate court, on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case. The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and closest principles of general utility.

"If the pleadings of a cause were to give no notice to the parties or to the court of the material facts in which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof differing from that stated in the pleadings, all will perceive

The complex and nature of a suit for divorce and for alimony will be suggested from the following cases: —

Gould *v.* Crow.[1] "A *divorce* suit is a proceeding *in rem.* The status of the husband is the *res* to be acted on and dissolved by the decree. The decree so pronounced is a judgment *in rem;* but such judgments can only have effect upon the thing acted on by the decree, and such rights as are dependent on that for existence. Therefore, if a court, in severing the marriage tie, undertakes to render a decree *in personam* as to alimony, *it* can have no extra-territorial effect." In this case there was no personal service upon the husband, which gave the court opportunity to show that judgment for divorce and for alimony proceeded on distinct grounds — that one could stand where the other could not. The allegations and circumstances authorizing the one are not identical with those authorizing the other.

Lytle *v.* Lytle.[2] "In divorce cases, no more than in any other, can the court render a decree for the payment of money by a defendant not personally served. The remedy for the complainant must, in these cases, be confined to the dissolution of the marriage tie, with the incidental benefits springing therefrom, and to an order for the custody of the children," — thus distinguishing between what is really "incidental" to divorce, from alimony, which is a possible but not invariable consequence of a number of facts of which divorce is only one.

Ellison *v.* Martin.[3] Action on an alimony claim. In the divorce suit there had been a prayer for alimony with allegations for divorce, judgment by default for $200 alimony, execution on husband's land, sheriff's sale and deed. By the court: "In her petition for divorce she alleged that her husband owned eighty

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the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts."

A Massachusetts jurist adds (Story's Eq. Pl., § 257): "*Every* fact essential to the plaintiff's title to maintain the bill and obtain the relief, *must be stated* in the bill, otherwise the defect will be fatal." See also Johnson *v.* Johnson, 4 Wis. 140.

Fulton *v.* Fulton, 36 Miss. 517, 520. "The decree of a court of equity upon oral allegations would be an idle act, if no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way." Windsor *v.* McVeigh, 93 U. S. 283.

Mere testimony as to the husband's means, without any pleadings concerning such duly served upon him, is equivalent to "oral allegations."

[1] 57 Mo. 203. [2] 48 Ind. 200, at p. 202. [3] 53 Mo. p. 577.

acres of land, but did not describe the land or its value. The plaintiff stood alone on the sheriff's deed. If the judgment for alimony was void, the sheriff's deed was also void.

"A divorce suit is a proceeding *in rem*, and the *res* is the status of the plaintiff in relation to the defendant, to be acted on by the court. There was nothing before the court to act on in regard to alimony in this case."

Thus, "an action for divorce and alimony" is really a combination of two differing suits. One suit is *in rem*, to change the status of the plaintiff, *i. e.*, for divorce. The other suit, joined with it, is *in personam*, for money, alimony. These suits are quite distinct in principle, and proceed on different grounds. Or, rather, the suit for divorce simply is founded on the court's statutory right to grant it, when a statutory cause for divorce is alleged and apparently proved; while the suit for alimony is founded on that, and something else besides.[1]

The subject will be made clearer by assuming a hypothetical case and a specified decree. Suppose a Mrs. Roe alleges "cruelty," with its specifications, and obtains on that alone a decree, say, of $1,200 yearly income. Does the mere allegation and proof of "cruelty" give her the right to $1,200 alimony per year? or the right to have the court grant such?[2]

Mrs. Roe's petition scantily alleges domicil and a statutory cause for release from her marriage vows, but no more. That renders the suit for divorce, indeed, complete. But there is no suit for alimony intertwined with that, except that incomplete portion of it, — the prayer for alimony. Does that state the title to $1,200 per year? Is all that is necessary to get that a perfectly general prayer, with not a solitary fact to cling to?

In Bushnell *v.* Avery[3] the court said: "No such condition of facts is set forth as entitles the plaintiff to the relief prayed for. . . . The stating part of the bill cannot be enlarged by the terms of the prayer for relief."[4]

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[1] "Probable cause for the suit, the wife's necessity, and the husband's ability, are the controlling considerations in determining whether the alimony and suit money will be allowed." Burgess *v.* Burgess, 25 Ill. App. 526.

[2] "In England alimony is made the subject of a special application or petition, separate and distinct from the libel for divorce. But we think ours is the better practice, in that it accords with the analogies of equity procedure, by including in the same bill all the allegations of fact upon which it may be necessary for the court to adjudicate for the purpose of a complete determination of all matters involved in this action." Damon *v.* Damon, 28 Wis. 514.

[3] 121 Mass. 148.

[4] See also Belle *v.* Merrifield, 109 N. Y. 202.

If upon cruelty alone being alleged Mrs. Roe has a right to $1,200 a year in alimony, then every pauper's wife, every poor washerwoman or ragpicker, has a right to ask for $1,200 a year as soon as cruelty in the husband is alleged and (apparently) proved in a mere divorce suit.

"The alleged marriage and faculty of the defendant, that is, his ability to pay such sums as may be decreed, must be admitted or proved before alimony can be awarded. (Bishop on M. & D., Vol. 2, Sec. 496)" . . . p. 250. "The amount of property owned by the defendant was a material averment in the bill, and material in the bearing of the question as to alimony. . . . It is a well-established doctrine that the facts upon which a decree is based must appear somewhere in the record."[1] Thus the right to alimony and the jurisdiction of the court to determine it is founded upon the husband's *alleged* ability to pay it — his ability to support a wife. It depends upon either his accumulated means, his income, or his capacity to earn, as alleged.

Unless these exist to the extent at least of $1,200 a year, the court has no right to grant that amount of alimony;[2] and the jurisdiction of the court, the power to exercise that right, the power to hear and determine, depends upon whether there is something to hear and something to determine; *i. e.*, whether there is a suit for $1,200; not only a suit for simple divorce, but a suit for that alimony, which must consist of written allegations (combined with those purely for divorce), that the husband's wealth, income, or earning ability is at least $1,200 a year.[3]

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[1] Becker *v.* Becker, 15 Ill. App. (Bradwell), p. 249.

[2] Park *v.* Park, 80 N. Y. 160: "It does not appear that the judgment (for alimony) exceeded the demands of the complaint (for divorce and alimony). The proper course, if the judgment was wrong in this respect, would be to vacate or modify the same."

[3] Remington *v.* Sup. Ct., 69 Cal. p. 633. Divorce and application for a writ of prohibition: "The issue in the divorce suit did not embrace the disposition of property. In an action for divorce, if a disposition of property is sought, there should be some pleading by which an issue as to such property would be tendered. It appearing in this cause that no such issue was tendered, the court had no jurisdiction to make the restraining order."

Jordan *v.* Jordan, 53 Mich. 552. Divorce. Held: "The bill of complaint says nothing in regard to alimony. There was nothing in the pleadings . . . to which the subject-matter of alimony was germane, or upon which the relief sought could be based. The court had *no power* to grant relief."

Clayton *v.* Clayton, 1 Ashm. (Pa.) 53: "Not a word is said in the libel about alimony. There was nothing in the pleadings . . . to which the subject-matter of the motion for alimony was germane, or upon which the relief sought could be based. Complainants of every description must recover *secundum allegata et probata*, and if we

The allegations of such fact without their proof would be futile. Certainly it seems the proof of them without allegations is equally so. Mrs. Roe does not allege *title* to $1,200 alimony; she consequently is unable to prove it. That the court has no right to listen to any evidence of what alimony she might otherwise deserve, and, therefore, no right to grant any decree for it, is lucidly shown in Bamford *v.* Bamford.[1]

"The complaint in the divorce suit contained no allegations in regard to property." Held, p. 36: "To enable the court to act judicially on the subject of property, it must appear in the complaint that the party has property, otherwise, there being nothing alleged, there is nothing to determine in respect to property, and nothing before the court on which to base a decree in this particular. *If nothing is stated concerning property, it can hardly be deemed a case concerning it.* . . . The contrary construction would require the court to decree concerning that which does not exist. The plaintiff has not acquired a legal or equitable right to the property by the decree of divorce [*i. e.*, the decree is a nullity]. The court may first pass upon the question of granting or denying the divorce, and afterwards, in the same suit, investigate and determine the issue concerning property. . . . The plaintiff had a right in her complaint to make an exhibit of her husband's pecuniary condition in order to lay a foundation for alimony." [2]

The decree for money in a divorce suit may be likened to the

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depart from this salutary rule, we cannot foresee the inconvenience which might arise. We are ready to decree a divorce, but no other."

Cassidy *v.* Cassidy, 63 Cal. 352. Divorce: "It is well settled that the findings in a divorce case must respond to all the material issues made by the pleadings."

Porterfield *v.* Butler, 47 Miss. 170: "A judgment without issue joined is a *nullity*. The pleadings in a case must evoke an issue of law or of fact before a judgment can be rendered. Judgments without issues to be determined by them are nullities."

Ulrich *v.* Ulrich, 4 Pa. County Ct. 133. Divorce: "Respondent cannot even be compelled to pay costs in divorce when there is no allegation that he was able to pay and he denied his ability."

[1] 4 Or. 30.

[2] Spoor *v.* Coen, 44 O. St. 502: "To bring a cause before a court competent to adjudicate upon it, it is not only necessary that the parties be cited or summoned in the manner required by the law of procedure, but a case must be made or stated, affecting the party against whom relief is asked. A judgment rendered where no case has been stated is as much a judgment upon a case *coram non judice*, whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it."

Milner *v.* Shipley, 94 Mo. 109: "The court had *no jurisdiction* to render a judgment against property different from that described in the petition. . . . The judgment is therefore void and open to collateral attack."

judgment for money in a damage suit. In the divorce suit the wife claims that she is damaged, as it were, by the enforced loss of her husband's support, through his fault, to the extent of the support the husband could or should give her, did she remain a wife. These are her damages and her alimony. Where no damages are alleged, where is the court that has jurisdiction to grant any?[1]

The decision of Crocket *v.* Lee (*supra*, p. 26, note) was followed years after by a much-quoted and all-important case, in which the supreme tribunal of the nation lays down the following principles:[2] —

"It is an essential ingredient in every case that there should be proper judicial proceedings upon which to found the decree; that is, that there should be certain written allegations, or statements of the charge for which the seizure is made, and upon which the forfeiture" [of the husband's property] "is sought to be enforced. If condemnation is made without any specific cause of forfeiture" [the specified amount of financial loss incurred by the wife because of her enforced divorce from a wealthy husband], "the sentence is not so much a judicial sentence as an arbitrary sovereign edict.

P. 281. "Such sentences are mere mockeries, in no just sense judicial findings; they ought to be condemned both *ex directo* and *collaterally*, as mere arbitrary edicts and substantial frauds.

P. 282. "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in the extent . . . of its judgments" (which cannot extend beyond the limit of the allegations of damages or alimony named by the wife).

P. 283. "A departure from established modes of procedure will often render the judgment *void*. The decree of a court upon oral allegations, without written pleadings (if that on which the decree is based), would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor."

Is the respondent entitled to no notice of the extent to which he may be entitled — no notice of the outside *limit* of the damages charged upon him — until the decree is an accomplished fact?[3]

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[1] Velvin *v.* Hall, 78 Ga. 139: "It is the amount of damages laid in the declaration that fixes the jurisdiction."

[2] Windsor *v.* McVeigh, 93 U. S. p. 280.

[3] Howe *v.* Howe, 4 Rev. 469. Divorce Appeal from alimony. Held: "It is claimed that the court erred in awarding alimony to Mrs. Howe. In a proper case the court would have such *power*. *Here*, no such issue was presented. The pleadings say nothing

To decree a sum of money (alimony) from one individual to another, without written pleadings, duly served, in a lawful suit, "according to the law of the land," is simply a forfeiture and confiscation of property.[1] A criminal can know, from the penal codes, to what extent he may be fined for some forbidden act. But the penalty for an act forbidden by divorce law, in a suit often termed "*quasi* criminal," is limitless, if none need be alleged. The tendency of American constitutions is to repress anything like confiscation, attainder, forfeiture. Is there no limit to the forfeiture of property that the unfortunate husband may suffer when cause for divorce is apparently made out by a woman seeking release from her marriage vows?

The true husband may have had good and proper reason for wishing to surrender a wife recently unworthy, and for being unwilling to resist a simple action for divorce. Is he liable, if he is silent, if he refuses to answer only to that extent — the extent of the divorce charges — to have his entire property swept from him, perhaps, by a hasty decree, in his absence, without notice of the calamity until it has happened?

Let us assume that she swears, with her easy readiness, that her husband is "worth a million dollars," and orally asks a decree for $500,000. Is she not as equally entitled to it, under the hypothetical libel, as to a decree for $1,200? Allegations of amounts, figures, boundaries, limits, are all totally wanting here.

The wife is not the only one who has rights in a divorce suit. It was she who voluntarily brought it. If any confusion grows out of her illegal pleading, upon whom must the hardship rest? Upon the one who seeks relief from the burdens of a lawless decree, or upon the unmarried individual, of full age, who yet wants some one else to support her; who has sought exemption from the duties of a wife, and yet the retention of a wife's full financial privileges; who seeks it upon a decree obtained without notice, and from a man who may have a lawful wife and

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upon the question of property. The appellant might well have believed from the complaint that no such case was made. Decree reversed, so far as it purports to make disposition of, or concerning, property."

Sanchez *v.* Sanchez, 21 Fla. 346: "An order for alimony . . . where it does not appear by the record that the husband was *duly* notified, will be set aside as void."

[1] Brooks *v.* Aubury, 7 Or. 464; Taylor *v.* Porter, 4 Hill, 146; Fisher *v.* McGin, 1 Gray, 32; Burr *v.* Burr, 7 Hill, 231; Dartmouth College *v.* Woodward, 4 Wheat. 519; Cooley on Const. Limitations, pp. 432, 437.

children to provide for? To whom should the consideration, if any, be shown?

The husband has a right to rely on the belief that his property will not be taken from him except "according to the law of the land," and to absent himself, if he sees fit, from the hearing of a suit that in legal reality only asks a divorce. He may rely on the belief that under a prayer for alimony, with no allegations of that which gives right to it, the court will act lawfully.

In Bender *v.* Bender,[1] a suit for divorce and alimony, the grounds for alimony as alleged in the pleadings of the case were different from those recited in the decree. Held: —

"The plaintiff made one case in her pleadings, and has succeeded in obtaining an (alimony) decree in another and different state of facts. 'The maxim that the decree must be *secundum allegata*, as well as *secundum probata*,' says Chief Justice Marshall in Schooner Hoppett *v.* U. S.,[2] 'is essential to the due administration of justice in all courts.' The rule is founded in sound reason and good sense, and it requires that a party must obtain a decree on the grounds stated in the pleadings, and that the proofs must tend to establish the material allegation therein, and its observance by the court is absolutely essential to the due administration of justice." Decree for alimony reversed.

If, in the opinion of any, it is improper in the man to refuse to resist separation from a wife who wants to get rid of him, surely the penalty is not without limit. He still has some remaining rights as to his own property, which it is the court's duty to maintain.[3]

Where, in the record of the whole divorce suit, are those allegations which bring the subject-matter of alimony, to the extent of the decree, within the jurisdiction of the court?

In Cummings *v.* Cummings,[4] a suit for divorce and alimony, it was held (p. 440): —

"The portions of the decree as to alimony must be reversed; they are not based upon any pleading in the cause. P. 441: The relief which the court below attempted to grant plaintiff was neither consistent with the case made by the complaint nor embraced within the issues made by the answer. In Gregory *v.* Nelson (41 Cal. 278) it was held that if a judgment in equity deems the existence of any facts not within

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[1] 14 Or. 355.

[2] 7 Cranch, 389.

[3] Hinkley *v.* Machine, 15 N. J. L. (3 Greene) 476. "A court, by a rule of practice, cannot alter the law."

[4] 75 Cal. 435.

any issues made or tendered by the pleadings, and then pronounces the judgment of the court upon such facts, *such part of the judgment is superfluous and nugatory*. See also 33 Cal. 474. A judgment for the plaintiff must be limited by the facts stated in the complaint. When the defendant has answered, the court may, under the general prayer, grant any relief consistent with the facts alleged in the complaint, but under the general prayer no relief can be granted in equity beyond that which is authorized by the facts stated in the pleadings." [1]

II.

The Massachusetts statutes empower Massachusetts courts to decree alimony only "according to the *course of proceeding* in ecclesiastical courts and in courts of equity." [2]

In Lovett *v.* Lovett,[3] the Supreme Court of Alabama says: "The mode of proceeding in the ecclesiastical courts to obtain alimony is by an allegation of the 'faculties,' as it has been called, on the part of the wife, setting out the estate of the husband." [4]

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[1] Davol *v.* Davol, 13 Mass. 264. An unauthorized alimony decree is not voidable, but void.

Com. *v.* Blood, 97 Mass. 539. Divorce courts are, as to divorce matters, courts of limited and inferior jurisdiction.

Runge *v.* Franklin, Texas, 1889, 3 Law R. Ann. 417.

[2] Pub. Stat. c. 146, s. 33. [3] 11 Ala. 771.

[4] Windsor *v.* McVeigh, 93 U. S. 283: "A departure from *established modes of procedure* will often render the judgment *void*. The decree of a court upon oral allegations, without written pleadings [if that on which the decree is based], would be an idle act of no force. . . . Though the court may possess jurisdiction of a cause and of the parties, it is still limited in its modes of procedure."

Pennoyer *v.* Neff, 95 U. S. 733: "Due process of law means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

Also, Weber *v.* Weber, 16 Or. 163; Bunnell *v.* Bunnell, 25 Fed. Rep. 214; Anthony *v.* Kasey, 83 Va. 338; Wright *v.* Dann, 22 Pick. 59; Stewart on M. & D., § 361; Bishop on M. & D., 2d vol., 6th ed., 467; 75 Pa. St. 460; Barber *v.* Root, 10 Mass. 265; Lowe *v.* Alexander, 15 Cal. 297; Orrok *v.* Orrok, 1 Mass. 341; Gaiquon *v.* Aster, 2 How. 341; Thatcher *v.* Powell, 6 Wheat. 119; 34 Cal. 333; 23 La. An. 483; Beadleston *v.* Beadleston, 103 N. Y. 404; Bishop on M. & D., § 446, 447; Phelan *v.* Phelan, 12 Fla. 449; Campbell *v.* Campbell, 37 Wis. 208; Hoke *v.* Henderson, 25 Am. Dec. 681 (4 Devereux, Law, 1); Murray *v.* Hoboken, 18 How. 272; Rees *v.* City of Watertown, 19 Wall. 122; Huber *v.* Reilly, 53 Penn. St. 118; Freeman on Judgments, § 587.